Supreme Court, U.S.
FILED
FEB 10 2005
OFFICE OF THE CLERK

No. 04-278

In The
Supreme Court of the United States

TOWN OF CASTLE ROCK, COLORADO,

Petitioner,

v.

JESSICA GONZALES, individually and as next best friend of her deceased minor children, REBECCA GONZALES, KATHERYN GONZALES, and LESLIE GONZALES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF AMICUS CURIAE THE FAMILY VIOLENCE PREVENTION FUND, THE NATIONAL CENTER ON DOMESTIC AND SEXUAL VIOLENCE [AND OTHERS] IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE[1]

The Family Violence Prevention Fund ("FVPF") is a national nonprofit organization, founded in 1980 and incorporated in the state of California. FVPF has worked to end violence against women and children for the past 25 years, including through providing education for the judiciary. FVPF knows that abused women confront many obstacles privately before asking a court to issue a protection order. Those orders, however, provide no protection for them or their children if not enforced by police.

The National Center for Domestic and Sexual Violence ("NCDSV"), a nonprofit organization founded in 1998 and incorporated in the state of Texas, is a national organization that provides training and technical assistance on issues of domestic violence and sexual assault. Much of this training and technical assistance focuses on law enforcement officials as NCDSV knows that the safety of abused women and children is further jeopardized when these officials refuse to enforce protection orders.

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[1] Letters from petitioner and respondent indicating consent to file this brief are on file with the Clerk. Pursuant to Rule 37.6, no counsel for any petitioner or respondent authored this brief in whole or in part. Nor did any person or entity other than *amici* make a monetary contribution to the preparation or submission of this brief.

The remaining amici are: the Oregon Law Center, a nonprofit law firm that was incorporated in the state of Oregon in July 1998; Men Stopping Violence, a nonprofit organization founded in 1982 and incorporated in the state of Georgia; Life-Span, a nonprofit organization established in 1978 and incorporated in the State of Illinois in 1979; Sanctuary for Families, a nonprofit organization founded in 1984 and incorporated in the State of New York, and its programs, Sanctuary for Families' Center for Battered Women's Legal Services and Sanctuary for Families' Children's Program; WEAVE, a nonprofit organization founded in 1996 and incorporated in the District of Columbia; Ayuda, a nonprofit organization founded in 1973 and incorporated in the District of Columbia; the Domestic Violence Project, Inc./SafeHouse Center, a nonprofit organization founded in 1975 and incorporated in the state of Michigan; the Illinois Clemency Project for Battered Women, an organization founded in 1993 in Illinois; the Pace Women's Justice Center, a nonprofit 501(c)(3) organization founded in 1991 and incorporated in the state of New York; and the Rockland Family Shelter, a nonprofit organization founded in 1977 and incorporated in the state of New York. These organizations provide legal services, counseling, safety planning, legislative advocacy and related services to victims of domestic violence and their children. They all believe that mandatory protection order

enforcement is required to ensure the safety of abused women and children.

STATEMENT OF THE CASE

On May 21, 1999, fearing for the safety of herself and her children, Rebecca, Katheryn and Leslie ("the Gonzales Children" or "the Children"), Ms. Gonzales obtained a temporary protection order ("TPO") against Mr. Gonzales, her husband, based on the Douglas County District Court's express finding that physical or emotional harm would result if Mr. Gonzales was not excluded from the family home. (P.A. 3a) The TPO granted temporary custody of the Children to Ms. Gonzales, prohibited Mr. Gonzales from molesting or disturbing the peace of the Children or Ms. Gonzales, and consequently barred him from coming within 100 yards of the family residence. (*Id.*)

On June 4, 1999, the TPO was served on Mr. Gonzales, and on that same date, the TPO was slightly modified by the Court and made permanent (the "June 4th Order"). The court issued this order after determining that it was in the Children's best interest to allow their mother sole custody, except that Mr. Gonzales could come to the home for the limited purpose of picking up the Gonzales Children for parenting time. (P.A. 4a-5a); *Gonzales v. City of Castle*

Rock, 366 F.3d 1093, 1097 (10th Cir. 2004).[2] The remaining prohibitions on Mr. Gonzales's contact with the family that were in the TPO were continued. In addition, the June 4th Order directed law enforcement officials that they "shall use every reasonable means to enforce" the restraining order, they "shall arrest" or where impractical, seek an arrest warrant for those who violate the restraining order, and they "shall take the restrained person to the nearest jail or detention facility." *Id.* at 1096.

On Tuesday, June 22, 1999, only two and a half weeks after the court issued the June 4th Order to protect the Gonzales Children, Mr. Gonzales abducted the Children while they were playing outside their home. During a long, and no doubt terrifying night for the Children, police for the Town of Castle Rock ("Castle Rock") ignored Ms. Gonzales's in-person request for enforcement of the June 4th Order against Mr. Gonzales, as well as her many calls over the course of the evening and into the early morning hours of the next day.

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[2] At the time the June 4th Order was issued, Colorado defined domestic abuse as follows:

> any act or threatened act of violence that is committed by any person against another person with whom the actor is a current or former relation, or with whom the actor is living or has lived in the same domicile, or with whom the actor is involved or has been involved in an intimate relationship.

Continued . . .

Finally, at 3:20 a.m., Mr. Gonzales arrived at Castle Rock police headquarters and opened fire. The police found the Children, whom Mr. Gonzales had murdered, in his vehicle.

The police officers' failure to enforce the June 4th Order, in the face of its mandatory language and the Colorado mandatory arrest statute, Colo. Rev. Stat. § 18-6-803.5, was a violation of the Gonzales Children's constitutionally protected procedural due process rights. The Tenth Circuit held as much, and this appeal followed.

SUMMARY OF THE ARGUMENT

The Castle Rock police department's failure to grant the Gonzales Children even minimal procedural due process before refusing to enforce the June 4th Order their mother had obtained violated the Children's Fourteenth Amendment rights.

Like many other states, Colorado clearly recognizes that children can be protected parties under a protection

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Continued . . .
Colo. Rev. Stat. Ann. § 14-4-101(2) (amended and recodified at Colo. Rev. Stat. § 13-14-101(2)).

order issued to prevent an abusive parent from causing future harm. Further, in a 1994 overhaul of the state's domestic violence laws, the Colorado General Assembly adopted a protection order provision with a mandatory arrest requirement for violators. Colo. Rev. Stat. § 18-6-803.5. Mandatory arrest provisions, which require police to arrest protection order violators on probable cause, promote the safety of women and children, especially in light of the considerable research and data that demonstrate the dangers to women and children of attempting to separate from their abuser.

The June 4th Order, coupled with the mandatory arrest provisions of the Colorado statute, created a constitutionally protectible interest held by the Children and their mother. Given this, minimal procedural due process, including at least a few minutes of discussion and evaluation, had to be provided before police could grant or deny enforcement of the June 4th Order. As the Tenth Circuit properly concluded, the Castle Rock police officers' refusal to even consider enforcement of the June 4th Order did not satisfy this constitutional standard.

Amici urge the Court to hold that such minimal procedural due process inquiries must occur when women and/or children seek protection order enforcement in a state

that has a mandatory arrest requirement in its protection order statute.

ARGUMENT

I. The Police Officers' Failure to Grant the Gonzales Children Even Minimal Due Process Undermined the June 4th Order and the Long History of Judicial and Legislative Efforts to Protect Victims of Domestic Violence

The Gonzales Children's deaths are undeniably tragic. Their short lives were ended violently by the very person from whom a court had determined they needed protection. Yet, rather than enforcing the June 4th Order, as mandated by the Colorado statute, the police eviscerated the court's work by refusing to act – in direct contravention of the judiciary's mandate and in abdication of their mandatory obligations under the Colorado statute.

A. The Police Department's Refusal to Enforce the Protection Order Deprived the Gonzales Children of the Protection Promised Through Colorado State and Federal Laws

In 1994, the Colorado General Assembly passed H.B. 1253, omnibus legislation overhauling Colorado's domestic violence law, Colo. Rev. Stat. § 18-6-803.5, to strengthen the

protections for victims of domestic violence. The legislation instituted a mandatory statewide arrest policy for the violators of domestic violence protection orders.[3] In the same section that provides for the mandatory arrest of protection order violators, the General Assembly gave police officers immunity from liability arising from erroneous arrests made in the course of enforcing protection orders. Colo. Rev. Stat. § 18-6-803.5(5). Thus, the General Assembly expressed its preference that police officers be prompt and assertive in their arrests of protection order violators, rather than slow and circumspect.

Civil protection order statutes provide victims of domestic violence as well as their children with the opportunity to prevent future violence by obtaining a court order instructing an abuser to refrain from or to undertake specific acts. *See* FREDERICA LEHRMAN, DOMESTIC VIOLENCE PRACTICE & PROCEDURE, § 4:1 at 4-2 (1997, August 2004 Supp.). In recognition of the protection they can provide, every state in the nation has enacted statutes that enable courts to issue protection orders where they find that domestic violence has been perpetrated. *See id.* The relief available through state protection order statutes is as

[3] The General Assembly concluded "the issuance and enforcement of protection orders are of paramount importance . . . because [they] promote safety, reduce violence, and prevent serious harm and death." Colo. Rev. Stat. Ann. § 13-14-102.

varied as are the safety needs of abused women and their children. *See* Nicole E. Allen, *et. al*, *Battered Women's Multitude of Needs: Evidence Supporting the Need for Comprehensive Advocacy*, 10 (9) Violence Against Women 1015 (Sage Pubs. Sept. 2004).[4]

Protection orders, however, are only as effective as their enforcement. An order without enforcement can create a false sense of security for victims of domestic violence, and actually increase the chance of danger to the very person or persons the order is intended to protect. *See* Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statues & Case Law*, 21 HOFSTRA L. REV. 801, 1095 (1993) ("For enforcement to work . . . most of all, police, prosecutors, and judges should respond sternly to violations that are reported."). A protection order is one of several strategies employed by abused women and children as part of a larger safety plan. *See* Jill Davies, *Building Opportunities for Battered Women's Safety and Self Sufficiency*, Violence Against Women Online Resources available at http://www.vaw.umn.edu/documents/welprac1/welprac1.html (1998). Were it not for the security of the protection order, as promised

[4] Where possible, counsel has identified the availability of some of the publications cited on the World Wide Web. All of these publications are available from counsel and can be promptly furnished to the Court upon request.

through the statute and the order itself, Ms. Gonzales may well have made different decisions for herself and her children with regard to safety planning around work, child care, travel, and perhaps even relocation.

1. Protection Order Statutes in Colorado, and Most States, Recognize Children As Protected Parties

Over the past thirty years, states have enacted legislation in recognition of the danger that perpetrators of domestic violence pose to their ex-partners as well as their children. In Colorado, as in most jurisdictions, protection orders are intended to protect both the abused partner and the children by providing them with a legally enforceable means of achieving safety.[5] *See* Melody K. Fuller & Janet L. Stansberry, *1994 Legislature Strengthens Domestic Violence Protective Orders*, 23 COLO. LAW 2327 (1994); *Stuckey v. Stuckey*, 768 P.2d 694 (Colo. 1989) (affirming a permanent

[5] In addition to gaining protection through an order issued on behalf of their parent, children can benefit from an order issued entirely on their own behalf. Many statutes authorize an adult to file for a civil protection order on behalf of a minor child who has suffered physical or sexual abuse at the hands of his or her parent. *See e.g.*, Del. Code Title 10 § 1041(1)(vi); Ill. Comp. Stat. Chap. 725 § 5/112A-4(b); Maine Rev. Stat. Title 19 § 764(1).

restraining order forbidding the father of a minor child from having any contact with the child).[6]

State legislators enacted these statutes in response to the overwhelming evidence that individuals who perpetrate domestic violence against their spouses or partners are several times more likely to abuse their children. *See* Lundy Bancroft, *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics,* Synergy: Newsletter of the Nat'l Council of Juvenile and Family Court Judges (Winter 2002) at 6. In cases involving parental child abuse, researchers have found that a history of domestic violence by one parent against the other is "perhaps the single most common background factor." Report of Evan Stark, Ph. D., MSW, Rutgers Univ., *The Battered Mother in the Child Protective Services Caseload: Developing an Appropriate Response* (undated, prepared for *Nicholson v. Williams,* 203 F. Supp. 2d 153 (E.D.N.Y. 2002)). In fact, one study found that 70% of perpetrators of domestic violence physically abused their children. Bowker, L. H., Arbitell, M., & McFerron, J. R. (1988), cited in FEMINIST PERSPECTIVES ON WIFE ABUSE 158-174 (K. Yllo & M. Bogard eds., Newbury Park, CA: Sage 1988). Simply put,

[6] *See also Aiken v. Stanley,* 816 N.E.2d 427 (Ind. Ct. App. 2004); *Commonwealth v. Majeed,* 694 A.2d 336 (Pa. 1997); *Trolinger v. Trolinger,* 42 P.3d 157 (Kan. Ct. App. 2001); *Batey v. Dare,* 742 So. 2d 194 (Ala. Civ. App. 1999).

children with an abusive parent stand a greater risk of harm. *See* Evan Stark & Anne Flitcraft, *Women and Children at Risk: A Feminist Perspective on Child Abuse*, 18 INT'L J. OF HEALTH SERVS. 102 (1988); *see also* Presentation of Jay G. Silverman, Ph.D., Harvard Univ., *Intimate Partner Violence against Women and Implications for the Health and Well-Being of Children: The Batterer as Parent* at Harvard Univ. (July 29, 2003) (citing Herman-Giddens et al., 2000) (preceding publication of L. BANCROFT, J.G. SILVERMAN, "ASSESSING ABUSERS RISKS TO CHILDREN" IN PROTECTING CHILDREN FROM DOMESTIC VIOLENCE: STRATEGIES FOR COMMUNITY INTERVENTION (P. Jaffe, L. Baker, & A. Cunningham, eds., Guildford Publications, N.Y. 2004)).

The United States Congress recognized the dangers that abusers pose to abused women and their children when it passed the Violence Against Women Act ("VAWA") in 1994. Pub. L. No. 103-322, 108 Stat. 1902 (codified as amended in scattered sections of 8, 16, 18, 28, and 42 U.S.C.). In particular, Congress acknowledged the heightened risk to abused parents and their children post-separation when it included in the VAWA "Full Faith and Credit" provisions that mandate nationwide enforcement of protection orders. 18 U.S.C. §§ 2265-2266.

The VAWA Full Faith and Credit provisions require that all relief included in any state's protection order must be

enforced by any other state, so long as the protection order was "issued for the purpose of preventing violent or threatening acts or harassment against, or contact or communication with or physical proximity to, another person[.]" 18 U.S.C. § 2266(5). The provisions apply to *ex parte,* temporary, and permanent orders that are issued by a civil or criminal court "whether obtained by filing an independent action or as a pendente lite order in another proceeding, so long as any civil order was issued in response to a complaint, petition or motion filed by or on behalf of a person seeking protection." *Id.*

Modern domestic violence laws also recognize that domestic violence can have life altering, detrimental impacts on children. *See* H. Lien Bragg, *Child Protection in Families Experiencing Domestic Violence*, Dep't of Human Services, Office of Child Abuse Neglect, at 15-17, 26-27 (2003); *see also* Fred Brown, "New Domestic Violence Laws Take Effect; State Makes it Easier to Keep Abusers at Bay," DENVER POST, July 2, 1994 ("Sponsors of the 1994 Colorado legislature cited 'significant links between incidents of domestic violence and juvenile violence' as one of the many reasons for enacting such sweeping changes.").

In many instances, domestic violence culminates in murder or murder-suicide. And, as in this case, the murder victims often include children. Indeed, "domestic violence

has been found to be the single most common precursor to child death in the United States." National Center for Children Exposed to Violence, available at www.nccev.org/ violence/ domestic.html (citing L. G. Mills, *et. al., Child Protection and Domestic Violence: Training, Practice and Policy Issues*, 22 (5) Children & Youth Servs. Rev., 315-332 (2000)).

Further, the risk of harm to abused women and their children from an abusive spouse increases during the period following separation. Men who engage in domestic violence often want to punish the woman for separating from them to penalize her for exercising her autonomy.[7] This terroristic goal is all too frequently accomplished through the physical assault, abduction, or even murder of the children whom she loves. Laura Crites & Donna Coker, *What Therapists See That Judges May Miss: A Unique Guide to Custody Decision When Spouse Abuse is Charged*, Judges J. (Spring 1988); *see also* Peter Jaffe, *et. al, Child Custody and Domestic*

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[7] *See* Janet Johnston, *et. al*, , *Early Identification of Risk Factors for Parental Abduction*, Juvenile J. Bull. 10 (U.S. Department of Justice March 2001) ("[A]busive husbands are more likely to seriously harm or kill their wives during marital separation."); *see also* Martha Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991) (termed "separation assault," the increased risk of assault arises from the blatant threat that an abused woman's separation poses to her former partner's authority and control).

Violence: A Call for Safety and Accountability (Sage Pubs. 2002).

Children of separating parents are often the link that provides the abusive parent with additional opportunities to exert control over his former partner. Sarah M. Buel, *The Impact of Domestic Violence on Children: Recommendations to Improve Interventions* (2001); *see also* Barbara Hart, *Children of Domestic Violence: Risks and Remedies*, available at http://www.mincava.unm.edu/hart/ risks&r.htm (Abusive parents "use custodial access to the children as a tool to terrorize battered women or to retaliate for separation."); Report of Barbara Hart, *Parental Abduction and Domestic Violence*, (1992) available at http://www. mincava.umn.edu/documents/hart/hart.html.

Children of abusive parents are at enormous risk for child abduction and concomitant violence. *See* Hart, *Children of Domestic Violence: Risks and Child Remedies*, (40.4 children are abducted by a parent each hour, 41% of which occurs between the time of their parents' separation and divorce); GEOFFREY L. GREIF & REBECCA L.HEGAR, WHEN PARENTS KIDNAP: THE FAMILIES BEHIND THE HEADLINES, 221, 225, (The Free Press 1993) (the children most at risk for parental kidnapping are the one-quarter of all American children who live with only one parent). In 1988, an estimated 354,100 children were abducted by family

members, either in violation of a custody agreement or decree or by failing to return the child at the end of an ordered or agreed-upon visit. Report of David Finkelhor, *et. al, Missing, Abducted, Runaway, and Thrownaway Children in America, Executive Summary,* at v (U.S. Dep't of Justice, Office of Juvenile Justice & Delinquency Prevention May 1990). Men committed most of these abductions. *Id.* at xi. As in this case, the children taken are most often between the young ages of two to eleven years old and over half of the abductions involve unauthorized takings of the children, generally from the children's homes. *Id.*

B. Child Custody and Visitation Provisions Contained in Protection Orders Reflect the Recognition that Abusive Parents Pose a Danger, and Are Designed to Limit Custodial Access To Ensure That Abused Women and Children Remain Safe

Almost every state provides that a court can award temporary custody and visitation as one of the provisions in a civil protection order.[8] In some states, such as Colorado at the time of Ms. Gonzales's hearing, there is a presumption against awarding custody to abusive parents pursuant to a civil protection order. Colo. Rev. Stat. § 14-4-102(d)(III)

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[8] *See* LEHRMAN, DOMESTIC VIOLENCE PRACTICE & PROCEDURE, § 4:23 at 4-26; *see, e.g.*, Cal. Fam. Code § 6323; Fla. Stat. 741.30(6)(a); Ill. Stat. Chapter 725.

(amended and recodified at Colo. Rev. Stat. § 13-14-102(15)(e)(II.5)). Some states require courts to give primary consideration to the safety of the petitioner and the children in making custody decisions pursuant to protection orders. *See, e.g.*, Alaska Stat. § 25.24.150.

Most states also require courts to consider the impact of domestic violence when weighing the best interests of the child in custody and visitation proceedings. *See* Report of Barbara J. Hart, *Custody and Visitation Decision-Making When There Are Allegations of Domestic Violence* (1995) available at http://www.mincava.umn.edu/documents/hart/hart.html (reporting that, in 1995, 44 states and the District of Columbia had custody statutes that required courts to consider domestic violence when deciding custody).

Congress has gone even further. Noting that children of abusers are "at risk through shared custody arrangements," both the House and the Senate unanimously recommended the creation of a statutory presumption against awarding custody to an abusive parent. H.R. Con. Res. 172, 101st Cong., 2d Sess., 104 Stat. 5183 (1990) (the "Concurrent Resolution"). Section 403 of The Model Code of the Family Violence Project of the National Council of Juvenile and Family Court Judges (the "Model Code"), adopted by numerous states, incorporates the recommendations of the Concurrent Resolution. *See*

NATIONAL COUNCIL OF JUVENILE & FAMILY COURT JUDGES, MODEL CODE ON DOMESTIC & FAMILY VIOLENCE, § 403, at 34 (1994). *See also* Daniel G. Saunders, Ph. D., Univ. of Mich., *Child Custody and Visitation Decisions In Domestic Violence Cases: Legal Trends, Research, Findings and Recommendations*, Violence Against Women Online Resources at 5 (1988) available at http://www.vaw.umn.edu/documents/vawnet/custody/ custody.html.

In 1994, in the wake of the Concurrent Resolution and the Model Code, the Colorado legislature expressly amended the state's child custody laws to direct the award of temporary custody to the non-violent parent and to create a presumption against awarding permanent custody to an abuser. Colo. Rev. Stat. Ann. § 14-10-124. For this very reason, in this case, the Court granted Ms. Gonzales sole custody and restricted visitation in order to minimize future abuse to herself and her children.

II. The Police Violated the Gonzales Children's Procedural Due Process Rights

The Fourteenth Amendment of the U.S. Constitution dictates that no State shall "deprive any person of life, liberty, or property, without due process of law...." U.S. Const. amend. XIV, § 1. The Castle Rock police violated this mandate and the constitutional rights of the Gonzales

Children when they repeatedly ignored the Children's mother's pleas for enforcement of the June 4th Order issued to protect them from their abusive father.

A. The Children Had a Constitutionally Protectible Interest in Enforcement of the June 4th Order

This Court held nearly 40 years ago that children are entitled to the protections of the Fourteenth Amendment. *See In re Gault*, 387 U.S. 1, 13 (1967). ("[W]hatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."). Since then, the Court has repeatedly affirmed that children are "person[s]" within the meaning of the Fourteenth Amendment, and that, like adults, they have "constitutionally protectible interests." *Wisconsin v. Yoder*, 406 U.S. 205, 243 (1972)(Douglas, J. dissenting). *See also Bellotti v. Baird*, 443 U.S. 622, 633 (1979)("A child, merely on account of minority, is not beyond the protection of the Constitution."); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 74 (1976) ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.").

The Gonzales Children's due process claim, therefore, rises or falls on whether their interest in enforcement of the June 4th Order amounted to a constitutionally protectible property interest. *See Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972) (*citing Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). The Tenth Circuit held that it did, concluding that Colorado created a property interest within the meaning of the Fourteenth Amendment when it issued the June 4th Order. *Gonzales,* 366 F.3d at 1116.

Constitutionally protectible property interests "extend well beyond actual ownership of real estate, chattels, or money" to include "the security of interests that a person has already acquired in specific benefits." *Roth*, 408 U.S. at 572, 576. Such interests are created and defined "by existing rules or understandings that stem from an independent source such as state law." *Id.* at 577. They rise to the level of constitutionally protectible property interests where a "legitimate claim of entitlement" to the benefit in question exists, not merely a "unilateral expectation" or "abstract need or desire" for it. *Id.*

Whether a legitimate claim of entitlement exists turns on whether the underlying state statute establishing the benefit contains "particularized standards or criteria [to] guide the State's decisionmakers." *Olim v. Wakinekona*, 461

U.S. 238, 249 (1983). Where such substantive limits on official discretion exist and are coupled with a statutory mandate as to the "outcome [to] be reached upon a finding that the relevant criteria have been met," a constitutionally protected interest arises. *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 492 (1989). "[T]he use of 'explicitly mandatory language,' in connection with the establishment of 'specified substantive predicates' to limit discretion, forces a conclusion that the State has created a [constitutionally protectible] interest." *Id.* at 463.

The June 4th Order issued on behalf of the Children combined "specified substantive predicates" with "explicitly mandatory" enforcement language and therefore gave rise to a Constitutionally protectible interest. The specified substantive predicate was the June 4th Order's prohibition against Mr. Gonzales molesting or disturbing the Children's peace or coming within 100 yards of their home except under limited circumstances. Enforcement of this prohibition was not left to the court's general power of contempt. Instead, the June 4th Order specified mandatory self-executing consequences for its violation: the arrest of Mr. Gonzales. It directed law enforcement officials to "use every reasonable means" to enforce the June 4th Order, and specifically instructed them to arrest Mr. Gonzales and take him to the nearest jail or detention facility if they had "information amounting to probable cause" that he had

violated or attempted to violate the terms of the June 4th Order:

> "YOU SHALL ARREST, OR, IF AN ARREST WOULD BE IMPRACTICAL UNDER THE CIRCUMSTANCES, SEEK A WARRANT FOR THE ARREST OF THE RESTRAINED PERSON WHEN YOU HAVE INFORMATION AMOUNTING TO PROBABLE CAUSE THAT THE RESTRAINED PERSON HAS VIOLATED OR ATTEMPTED TO VIOLATE ANY PROVISION OF THIS ORDER . . ." (P.A. 92a).[9]

Taken together, the June 4th Order and the Colorado protection order statute set forth objectively ascertainable requirements as to Mr. Gonzales's conduct-- not molesting or disturbing the Children or coming within 100 feet of their

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[9] These requirements on the face of the June 4th Order mirrored the requirements of Colorado's protective order statute, Colo. Rev. Stat. § 14-10-108, upon which authority it was issued. Like the Order, the statute uses mandatory "YOU SHALL" language to refer to law enforcement's obligation to arrest. Colo. Rev. Stat. § 18-6-803.5(3)(b). The mandatory "YOU SHALL" arrest language is markedly stronger than the "YOU ARE AUTHORIZED" language used in subsequent sentences of the Order (and subsequent sections of the statute) to refer to the authority of the police to take efforts to protect the victim and the victim's children, such as by transporting them to a shelter. Colo. Rev. Stat. § 18-6-803.5(3)(b), (6)(a). Clearly, the legislature knew the difference between "mandatory" and "discretionary" mandates, and chose to make the arrest provisions mandatory.

family home. They also dictated the consequences for violation of these requirements-- directing the police to arrest Mr. Gonzales when they have information amounting to probable cause to believe that he has violated the requirements. The combination of limited police discretion and statutorily mandated consequences gave rise to a legitimate claim of entitlement by both Ms. Gonzales and her children. *See Thompson*, 490 U.S. at 492. That legitimate claim of entitlement was nothing more than that the terms of the June 4th Order would be enforced. The police department's arbitrary refusal to do so constituted a violation of the Children's rights to procedural due process. It allowed the very horror that the June 4th Order and the statute were designed to prevent-- the foreseeable infliction of abuse upon the children by their father.

Relying on *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972), the Town of Castle Rock argues that the "nature" of the Children's interest in enforcement of the June 4th Order was not such as to merit constitutional protection, Pet. Brief at 17, despite the fact that these children are named in the June 4th Order. In Castle Rock's view, the Children's interest stands in "stark contrast" to the interest of a parolee in continued conditional liberty. Although there is a contrast between the two interests, we conclude that it is the parolee's interest that pales by comparison with that of the Children. Parolees are, by definition, convicted felons who have

forfeited their right to unconditional liberty. Revocation of parole deprives them "not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions." *Morrissey,* 408 U.S. at 480. Children are, on the other hand, innocents at the mercy of the government to enforce their rights. Those children on whose behalf a protection order has been issued are particularly vulnerable because a court has already concluded that if protection is not provided in accordance with the terms of that order, an abusive parent is likely to inflict serious, or as in this case, lethal, harm. It is hard to imagine an interest more deserving of constitutional protection.

The Town of Castle Rock also argues that the Court should not allow "hindsight" to influence its determination of whether the Children's interest in enforcement of the June 4th Order amounts to a constitutionally protectible interest, "as it is only the rare instance in which police judgments regarding the balancing of [competing] demands [] leads to a tragic outcome." Pet. Brief at 18. This position ignores the very premise upon which the June 4th Order was based: an explicit finding by the issuing court that physical or emotional harm would likely result to the Children if the police did not keep Mr. Gonzales away from them and their home. *Gonzales*, 366 F.3d at 1096; (P.A. 3a). In arriving at this finding, the issuing court did not rely upon hindsight.

To the contrary, it took testimony and weighed relevant evidence, including Mr. Gonzales's notable history of erratic behavior and suicide attempts, both commonly understood to be indicia of future acts of domestic violence. *See* Section I.A.1. *supra*.

Indeed, a principal purpose of Colorado's 1994 domestic violence law was to take police discretion and hindsight out of the equation by providing for mandatory arrest where information amounting to probable cause to arrest exists. *See* Colo. Rev. Stat. § 14-10-109; Colo. Rev. Stat. § 18-6-803.5.[10] The combination of "prior restraint" and mandatory arrest is designed to ensure that children receive the protection they need and deserve at a meaningful time-- before an abusive parent harms them.

By consciously and affirmatively refusing to enforce the June 4th Order, the Castle Rock Police took it upon themselves to eliminate the critical mandatory arrest feature

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[10] Castle Rock makes much of the fact that the June 4th Order gave the police the option of "merely" seeking an arrest warrant where immediate arrest was impractical, or of using other "reasonable means" to enforce the June 4th Order. Yet, like immediate arrest, these options all furthered the critical objective of enforcing the June 4th Order and thereby preventing domestic violence. The option the police took here-- ignoring Ms. Gonzales's pleas for enforcement-- was one not authorized by the June 4th Order or the statute. It served no purpose other than to indulge the individual police officers' laziness and to facilitate Mr. Gonzales's lethal plans.

of this carefully designed statutory scheme, contravening both the will of the legislature and the express terms of the June 4th Order. Having done so, it is ironic that they now decry the Tenth Circuit for allegedly "supplanting the State's enforcement procedures" by recognizing that the Children had a constitutionally protectible interest in having the June 4th Order enforced. (Pet. Brief at 24).

B. The Castle Rock Police Did Not Afford the Gonzales Children Any Due Process, Let Alone the Due Process to Which They Were Constitutionally Entitled

The termination of a protected property interest always calls for some "orderly process." *Morrissey*, 408 U.S. at 482. The precise contours of that process vary, depending upon the circumstances involved, and in particular "the extent to which the recipient may be 'condemned to suffer grievous loss.'" *Santosky v. Kramer*, 455 U.S. 745, 758 (1982). Regardless of the interest at stake, however, the right to be heard must be conducted "at a meaningful time and in a meaningful manner." *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970).

The interest at stake in enforcement of the June 4th Order here was the well-being-- and indeed the lives-- of innocent children. It is difficult to imagine a more compelling interest than theirs-- or one more deserving of

process. Yet, the Castle Rock police gave the Children no process at all. Despite numerous pleas for help from their mother and a June 4th Order that expressly named them as beneficiaries, the police did absolutely nothing after their father abducted them. They did not even make a probable cause determination, let alone act on it as mandated by the statute. Three defenseless children were murdered as a result.

The process that would have prevented this tragedy is the process to which the Children were constitutionally entitled: it was neither a formal hearing nor a cumbersome investigation, but rather a reasoned police response, including a brief inquiry as to the validity of the June 4th Order and the existence of probable cause. *Coffman v. Wilson Police Dep't*, 739 F. Supp. 257, 266 (E.D. Pa 1990).

Most importantly, this process should have been provided *before* the police decided not to enforce the June 4th Order because, predictably, the Children did not live long after that arbitrary decision. Where innocent children are at risk of being harmed or killed by an abusive parent, there can be no question that process delayed is process denied.

CONCLUSION

Given the alleged custom and policy of the Castle Rock police in disregarding claims of protection order violations, it is very likely that many more children will be exposed to increased risk of harm, or even death, if protection orders continue to be ignored. Without effective enforcement, protection orders are meaningless. *Amici* urge this Court to clarify that procedural due process rights must be safeguarded when police are presented with evidence that a protective order has been violated in a state with a mandatory arrest statute. While it is too late to save Rebecca, Katheryn and Leslie, the lives of other young children almost certainly depend on it.

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February 9, 2005